# Ber Ahmad Shukri bin Ismail; ex parte Lembaga Kumpulan Wang Simpanan Pekerja

MAHKAMAH TINGGI (TEMERLOH) — KEBANKRAPAN NO CB-29PB-159–12 TAHUN 2021
ROSLAN MAT NOR PK
17 MAC 2023

*Kebankrapan — Pengenepian dan pembatalan — Permohonan — Perayu memohon notis kebankrapan dan petisyen pemiutang diketepikan dan perintah kebankrapan dibatalkan — Rayuan terhadap keputusan timbalan pendaftar menolak permohonan perayu — Sama ada permohonan adalah teratur — Sama ada perbuatan kebankrapan berlaku seperti dinyatakan dalam petisyen pemiutang — Sama ada petisyen kebankrapan terjejas — Sama ada perintah kebankrapan wajar diketepikan*

Ini adalah rayuan terhadap keputusan timbalan pendaftar yang telah menolak saman dalam kamar perayu ('penghutang penghakiman'). Penghutang kehakiman melalui saman dalam kamar tersebut memohon agar notis kebankrapan bertarikh 30 Oktober 2019 diketepikan, perintah kebankrapan ke atas penghutang kehakiman pada 28 Oktober 2021 juga dibatalkan dan petisyen pemiutang bertarikh 19 Jun 2020 diketepikan. Asas kepada permohonan untuk membatalkan notis kebankrapan adalah disebabkan tiadanya perbuatan kebankrapan disebabkan tempoh tujuh hari yang diberikan untuk penghutang penghakiman menjelaskan bayaran amaun di dalam notis kebankrapan itu bukannya tamat pada 25 Disember 2019 tetapi 26 Disember 2019. Pemiutang penghakiman berhujah bahawa saman dalam kamar yang telah difailkan oleh penghutang penghakiman adalah tidak teratur disebabkan: (a) permohonan dibuat di bawah k 17 Kaedah-Kaedah Insolvensi 2017; dan (b) penghutang pemghakiman sepatutnya mengemukakan notis rayuan di bawah s 92 Akta Insolvensi 1967.

**Diputuskan**, membenarkan rayuan:

(1) Saman dalam kamar yang dikemukakan di bawah k 17 Kaedah-Kaedah Insolvensi 2017 adalah teratur. Tindakan penghutang penghakiman memfailkan permohonan dengan menggunakan saman dalam kamar adalah sesuatu yang teratur. Ini adalah disebabkan penghutang penghakiman bukannya merayu kepada keputusan mahkamah kebankrapan di bawah s 92 Akta Insolvensi 2017 yang menyatakan bahawa proses rayuan tersebut adalah seperti yang digunapakai di dalam satu rayuan kepada Mahkamah Tinggi seperti yang dinyatakan dalam s 92 Akta Insolvensi 2017 tersebut (lihat perenggan 9 & 11).

(2) Pengiraan perbuatan kebankrapan sepatutnya berlaku pada 26 Disember 2019 dan bukannya 24 Disember 2019 disebabkan 25 Disember 2019 adalah hari kelepasan am. Ini bermakna catatan di dalam petisyen rayuan yang menyatakan bahawa tarikh kebankrapan adalah 24 Disember 2019 adalah tidak tepat (lihat perenggan 16).

(3) Tiada permohonan untuk membetulkan ketidakaturan tarikh perbuatan kebankrapan di dalam petisyen pemiutang sehinggalah kepada perintah kebankrapan. Prosiding kebankrapan adalah sesuatu yang serius. Oleh itu kepatuhan yang ketat kepada peraturan-peraturan semasa mengemukakan notis kebankrapan, petisyen penghutang hatta sehingga kepada pengisytiharan kebankrapan perlu dipatuhi dengan sewajarnya. Kesilapan tarikh perbuatan kebankrapan itu adalah sesuatu yang asas (*material*). Ia mewajarkan mahkamah untuk membenarkan rayuan penghutang penghakiman terhadap keputusan timbalan pendaftar (lihat perenggan 21 & 23).

(4) Notis kebankrapan bertarikh 30 Oktober 2019 diketepikan, bahawa tiada perbuatan kebankrapan oleh penghutang penghakiman di bawah s 96 Kaedah-Kaedah Insovelsi 2017, petisyen pemiutang penghakiman bertarikh 19 Jun 2020 diketepikan dan perintah kebankrapan atas permohonan pemiutang penghakiman ke atas penghutang penghakiman pada 28 Oktober 2021 dibatalkan (lihat perenggan 24).

**[English summary**

This was an appeal against the decision of the deputy registrar in dismissing the appellant's ('the judgment debtor') summons in chambers. The judgment debtor through the summons in chamber requested that the bankruptcy notice dated 30 October 2019 to be set aside, the bankruptcy order on the judgment debtor dated 28 October 2021 also to be struck out and the creditor's petition dated 19 June 2020 to be set aside. The basis for the application to strike out the bankruptcy notice was that there was no act of bankruptcy due to the seven-day period given for the judgment debtor to pay the amount in the bankruptcy notice did not end on 25 December 2019 but 26 December 2019. The judgment creditor argued that the summons in chambers filed by the judgment debtor was irregular because: (a) the application was made under r 17 of the Insolvency Rules 2017; and (b) the judgment debtor should have served a notice of appeal under s 92 of the Insolvency Act 1967.

**Held**, allowing the appeal:

(1) The summons in chambers submitted under r 17 of the Insolvency Rules 2017 were in order. The act of the judgment debtor filing an application using a summons in chambers was something regular. This was because the judgment debtor was not appealing to the decision of the bankruptcy court under s 92 of the Insolvency Act 2017 which stated that the appeal

process that was applicable in an appeal to the High Court as per s 92 of the Insolvency Act 2017 (see paras 9 & 11).

(2) The calculation of the act of bankruptcy should have happened on 26 December 2019 instead of 24 December 2019 because 25 December 2019 was a public holiday. This meant that the entry in the appeal petition stating that the date of bankruptcy was 24 December 2019 was incorrect (see para 16).

(3) There was no application to correct the irregularity of the date of the bankruptcy act in the creditor's petition until the bankruptcy order. Bankruptcy proceedings were serious matters. Therefore, strict adherence to the regulations when submitting bankruptcy notices, debtor's petitions and even up to the declaration of bankruptcy must be followed accordingly. The error in the date of the act of bankruptcy was something material. It justified the court to allow the judgment debtor's appeal against the deputy registrar's decision (see paras 21 & 23).

(4) The bankruptcy notice dated 30 October 2019 was set aside, that there was no act of bankruptcy by the judgment debtor under s 96 of the Insolvency Rules 2017, the petition of the judgment creditor dated 19 June 2020 was set aside and the bankruptcy order on the application of the judgment creditor against the judgment debtor on 28 October 2021 was struck out (see para 24).]

**Kes-kes yang dirujuk**

*Affin Bank Bhd (formerly known as Perwira Affin Bank Bhd) v Abu Bakar bin Ismail* [2020] 2 MLJ 689; [2020] 3 CLJ 739, MP (dibeza)

*BBMB Factoring Bhd v Mariam bte Sasiman and another appeal* [2000] 4 MLJ 20; [2000] 2 AMR 3127, MR (dirujuk)

*Bank Islam Malaysia Bhd v Gnasegar a/l G Vengadasamy* [2023] 1 MLJ 50; [2023] 2 MLRA 179; [2022] 1 LNS 2784, MR (dirujuk)

*Azman bin Jufri v Medtronic Australasia Pty Ltd* [2015] 6 MLJ 841; [2015] 5 CLJ 1026, MR (dirujuk)

**Undang-undang yang dirujuk**

Kaedah-Kaedah Insolvensi 2017 k 17, 18, 96
Akta Insolvensi 1967 ss 3(1)(i), 92, 105
Akta Tafsiran 1948 dan 1967 s 105(d)

*Vinod R Kamalanathan (Vinod Kamalanathan & Assoc) bagi pihak penghutang penghakiman.*

*Norsyakrina bt Kamal Arifin (Shahinuddin & Ranjit) bagi pihak pemiutang penghakiman.*

**Roslan Mat Nor PK:**

PENDAHULUAN

**[1]** Ini adalah rayuan kepada hakim dalam kamar terhadap keputusan timbalan pendaftar yang telah menolak saman dalam kamar perayu. Perayu melalui saman dalam kamar tersebut memohon agar notis kebankrapan bertarikh 30 Oktober 2019 diketepikan, perintah kebankrapan ke atas perayu pada 28 Oktober 2021 juga dibatalkan dan petisyen pemiutang bertarikh 19 Jun 2020 diketepikan.

ASAS PERMOHONAN

**[2]** Asas kepada permohonan untuk membatalkan notis kebankrapan adalah disebabkan tiadanya perbuatan kebankrapan disebabkan tempoh tujuh hari yang diberikan untuk penghutang penghakiman menjelaskan bayaran amaun di dalam notis kebankrapan itu bukannya tamat pada 25 Februari 2019 tetapi 26 Disember 2019.

**[3]** Penghutang penghakiman di dalam affidavit sokongan di lampiran 2 menyatakan bahawa perbuatan kebankrapan telah dikatakan dilakukan oleh penghutang penghakiman pada 24 Disember 2019. Ia adalah bercanggah dengan s 3(1)(i) Akta Insolvensi 1967 yang memperuntukkan seperti berikut:

> Acts of bankruptcy
>
> (1) A debtor commits an Act of bankruptcy in each of the following cases:
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> (a) ...
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> (b) ...
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> (c) ...
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> (d) ...
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> (e) ...
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> (f) ...
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> (g) ...
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> (h) ...
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> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the

service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

(j) ...

**[4]** Turut dibangkitkan ialah notis kebankrapan lampiran 2 bertarikh 30 Oktober 2019 dan diserahkan kepada penghutang penghakiman pada 17 Disember 2019. Isu yang timbul dalam kes ini ialah sama ada tarikh tujuh hari tersebut berakhir pada 25 Disember 2019 atau 26 Disember 2019. Ini adalah disebabkan tarikh 25 Disember 2019 adalah tarikh hari kelepasan am iaitu cuti hari Krismas. penghutang penghakiman menegaskan bahawa perbuatan kebankrapan tidak sepatutnya berlaku pada 24 Disember 2019 dan sepatutnya pada 26 Disember 2019. Ini menurut penghutang penghakiman telah menyebabkan petisyen pemiutang itu adalah tidak sah. Pada masa yang sama penghutang penghakiman menyatakan bahawa jumlah tuntutan dalam notis kebankrapan tersebut adalah tidak menepati peruntukan undang-undang.

ISU AWALAN PROSEDUR

*Adakah permohonan ini teratur?*

**[5]** Peguam pemiutang penghakiman berhujah bahawa permohonan ini tidak teratur. Ia disebabkan permohonan ini dibuat di bawah k 17 Kaedah-Kaedah Insolvensi 2017. Penghutang penghakiman sepatutnya mengemukakan notis rayuan di bawah s 92 Akta Insolvensi 1967. Bagi memahami isu ini, wajar sekiranya mahkamah meneliti peruntukan-peruntukan yang berkaitan dengan prosiding-prosiding kebankrapan di bawah Akta Insolvensi 1967.

**[6]** Dalam kes ini, pemiutang penghakiman berhujah bahawa saman dalam kamar (lampiran 1) yang telah difailkan oleh penghutang penghakiman adalah tidak teratur. Penghutang penghakiman tidak boleh menggunakan Kaedah-Kaedah Insolvensi 2017. penghutang penghakiman sewajarnya menggunakan s 92 Akta Insolvensi 1967 bagi merayu kepada keputusan Mahkamah Kebankrapan. Seksyen 92 Akta Insolvensi 1967 mengatakan kaedah berikut:

92 Appeals in bankruptcy

(1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.

(3) For the purposes of this section the Director General of Insolvency shall be deemed to be aggrieved by the refusal of any application made by him to the court.

**[7]** Apa yang menarik ialah jika s 92 Akta Insolvensi 1967 digunakan untuk rayuan, mahkamah mempunyai bidang kuasa yang luas seperti dinyatakan dalam kes *BBMB Factoring Bhd v Mariam bte Sasiman and another appeal* [2000] 4 MLJ 20; [2000] 2 AMR 3127.

**[8]** Seterusnya, mahkamah perlu membezakan rayuan di bawah s 92 dengan s 105 Akta Insolvensi 1967 yang memberikan kuasa untuk membatalkan perintah kebankrapan. Seksyen 105 Akta Insolvensi 1967 memperuntukkan seperti berikut:

105 Power of court to annul bankruptcy order in certain cases

(1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the bankruptcy order.

(2) Where a bankruptcy order is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts thereto for done by the Director General of Insolvency, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order.

(3) Notice of the order annulling a bankruptcy order shall be forthwith gazetted and published in at least one local paper.

(4) For the purposes of this section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt with costs,

and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court." A

**[9]** Dalam kes ini, mahkamah berpendapat saman dalam kamar yang dikemukakan di bawah k 17 Kaedah-Kaedah Insolvensi 2017 adalah teratur. Ini adalah disebabkan Kaedah-Kaedah Insolvensi 2017 memperuntukkan seperti berikut: B

> Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Judge otherwise directs, be made by summons in chambers supported by affidavit. C

**[10]** Mahkamah ini meneliti pemakaian k 17 Kaedah-Kaedah Insolvensi 2017 seperti yang dinyatakan oleh Mahkamah Rayuan dalam membahaskan k 18 Kaedah-Kaedah Insolvensi 2017 yang *pari materia* dengan peruntukan k 17 Kaedah-Kaedah Insolvensi 2017. Ini dinyatakan dalam kes *Azman bin Jufri v Medtronic Australasia Pty Ltd* [2015] 6 MLJ 841; [2015] 5 CLJ 1026. YA Vernon Ong Lam Kiat Hakim Mahkamah Rayuan menyatakan seperti berikut: D

> [38] We now return to the arguments on the correct mode of application. Applying the authorities cited above, it is settled law that the word 'shall' is mandatory and thereby imposes an obligation to comply with what is required to be done. We do not consider that since r 110 of the BR 1969 is silent on the mode of application, the applications made by notices of application are correct and regular. There is a clear stipulation in r 18(1) of the BR 1969 making it mandatory for an application to be filed by summons in chambers. In the circumstances, the filing of a notice of application by the JC as opposed to a summons in chambers is a clear breach of a mandatory provision. The breach is not a mere irregularity or formal defect capable of being cured. The application is in a sense the originating process upon which the JC seeks to obtain an order for substituted service. As such the wrong mode adopted by the JC undermines the very stratum of the application for substituted service itself and consequently, any order obtained thereunder must be equally tainted and rendered null and void. E F G

**[11]** Oleh itu dalam kes ini tindakan penghutang penghakiman memfailkan permohonan dengan menggunakan saman dalam kamar adalah sesuatu yang teratur. Ini adalah disebabkan penghutang penghakiman bukannya merayu kepada keputusan mahkamah kebankrapan di bawah s 92 Akta Insolvensi 1967 yang menyatakan bahawa proses rayuan tersebut adalah seperti yang diguna pakai di dalam satu rayuan kepada Mahkamah Tinggi seperti yang dinyatakan dalam s 92 Akta Insolvensi 1967 tersebut. H I

A ISU-ISU DALAM RAYUAN INI

**[12]** Penelitian kepada saman dalam kamar, affidavit-affidavit dan hujahan pihak-pihak mahkamah berpendapat terdapat isu-isu berikut yang perlu diputuskan oleh mahkamah dalam rayuan ini. Ia adalah:

B

(a) adakah perbuatan kebankrapan itu telah berlaku pada 24 Disember 2019 seperti yang dinyatakan dalam petisyen pemiutang;

(b) adakah jika perbuatan kebankrapan itu tidak betul, ia akan menjejaskan petisyen kebankrapan; dan

C

(c) adakah perintah kebankrapan wajar diketepikan.

*Isu (a)*

D **[13]** Penelitian kepada petisyen kebankrapan menunjukkan bahawa tarikh perbuatan kebankrapan telah dinyatakan di perenggan 5 petisyen pemiutang seperti berikut:

E

> Bahawa AHMAD SHUKRI BIN ISMAIL dalam masa enam (6) bulan sebelum tarikh penyerahan permohonan ini telah melakukan perbicaraan kebankrapan yang berikut, iaitu telah gagal sebelum hari Selasa 24 Disember 2019 untuk memenuhi kehendak notis kebankrapan yang dikeluarkan pada 30 Oktober 2019 dan diserahkan secara penyampaian kediri pada hari Selasa, 17 Disember 2019.

F **[14]** Mahkamah juga merujuk kepada s 3(1)(i) Akta Insolvensi 1967 yang memperuntukkan seperti berikut:

> 3 Acts of bankruptcy
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> (1) A debtor commits an Act of bankruptcy in each of the following cases:
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> G (a) ...
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> (b) ...
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> (c) ...
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> (d) ...
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> H (e) ...
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> (f) ...
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> (g) ...
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> (h) ...
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> I (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with

interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

(j) ...

**[15]** Persoalannya adalah bagaimanakah tatacara pengiraan tujuh hari tersebut bagi membolehkan satu tindakan tersebut dikatakan sebagai perbuatan kebankrapan. Mahkamah Rayuan dalam kes *Bank Islam Malaysia Bhd v Gnasegar a/l G Vengadasamy* [2023] 1 MLJ 50; [2023] 2 MLRA 179; [2022] 1 LNS 2784 menjelaskan berkenaan tatacara pengiraan perbuatan kebankrapan seperti berikut:

[9] The Insolvency Rules 2017 (formerly the Bankruptcy Rules 1969) or the Insolvency Act 1967 does not provide for the method of calculation of the seven-day period in s 3(1)(i) of the Insolvency Act 1967. However, r 284 of the Insolvency Rules (formerly r 276 of the Bankruptcy Rules) allows resort to the Rules of Court 2012 in the event of lacunae. Rule 284 reads as follows:

284. In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the Court 2012 shall apply, mutatis mutandis.

[10] Order 3 r 2 of the Rules of Court 2012 which makes provision for computation of time in respect of an act within a specified period, reads as follows:

2. Reckoning periods of time (O 3 r 2)

(1) Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.

(2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(3) Where an act is required to be done within or not less than a specified period before a specified date, the period ends immediately before that date.

(4) Where an act is required to be done within a specified number of clear days before or after a specified date, at least that number of days

must intervene between the day on which the act is done and that date.

(5) Where, apart from this paragraph, the period in question, being a period of seven days or less, would include the day before the weekly holiday or public holiday, that day shall be excluded.

[11] In s 54(1)(d) of the Interpretation Act 1948 and 1967 (Consolidated and Revised 1989) Act 388 (the Interpretation Act), a similar provision is made for exclusion of a day if the last day of the period is a weekly holiday or a public holiday (the so-called excluded days). Section 54 reads as follows:

(1) In computing time for the purposes of any written law:

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and

(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

[12] However, it must be noted that in s 54(1)(d) the exclusion of the said weekly public holidays or weekly holidays only applies if the relevant time period within which an act is directed to be done does not exceed six days. Section 105(d) of the same Act is in pari materia with s 54(1)(d) as well.

[13] The learned High Court judge had regard to s 105(d) but held that it does not apply to the instant case as the relevant time period to determine whether an act of bankruptcy has occurred is seven days after the service of the bankruptcy notice. Thus, it is not a period that is six days or less which can trigger the application of s 54(1)(d) or s 105(d). The learned High Court judge said as follows:

> [26] Seksyen 105(d) Akta Tafsiran 1948 dan 1967 dengan jelas menyatakan pengiraan masa adalah tidak termasuk cuti mingguan dan cuti am dan hanya terpakai bagi tempoh enam hari dan ke bawah. Maka dengan itu, cara pengiraan JC adalah tidak tepat dan pemfailan petisyen pemiutang oleh JC adalah di luar masa.

[14] The argument of the appellant that O 3 r 2(5) applies to a specified period of seven days or less (as opposed to six days) in respect of the exclusion of the weekly holiday or public holiday was not accepted by Her Ladyship, who said that it is subsidiary legislation. In saying that public holidays and weekly holidays are not excluded days under the Interpretation Act if the specified period is more than six days, Her Ladyship adopted the reasoning in the High Court cases of *Chiew Chiu*

*Sing v Dato' Seri Tiong King Sing* [2005] 1 MLJ 759; [2004] 2 MLRH 869; [2004] 8 CLJ 82; [2005] 1 AMR 109, *Credit Corporation Malaysia Bhd v Saraswathi Narayan & Ors* [1999] MLJU 768; [1999] 3 MLRH 201; [1999] 7 CLJ 459; [2000] 1 AMR 150, *Arab Malaysian Bank Bhd v Marina bt Mohd Yusoff* [1999] MLJU 400; [1999] 1 MLRH 760; [1999] 3 CLJ 633 and *OCBC Bank (M) Bhd v Tan Hui Min Elaine* [2017] MLRHU 1713.

[15] We shall now briefly consider these cases. *Chiew Chiu Sing v Dato' Seri Tiong King Sin*g was an election petition case. In that case, the High Court said that where there is a defined statutory period, it has to be strictly complied with and the Rules of Court 2012 cannot apply. The court cited *Credit Corporation Malaysia Bhd v Saraswathi Narayanan & Ors* where Abdul Hamid Mohamad J (as he then was) in hearing an injunction matter said the computation provided under O 3 r 2 only applies to matters that fall within the purview of the Rules of High Court and those outside are governed by s 54 of the Interpretation Act. In *Arab Malaysian Bank Bhd v Marina Mohd Yusoff*, Steve Shim J (as he then was) in hearing an application to set aside a judgment in default said that O 3 r 2 is only for the Rules of High Court. The above cases were cited and followed in *OCBC Bank (M) Bhd v Tan Hui Min Elaine* [2017] MLRHU 1713 which dealt with an application to set aside an order for sale.

[16] In our opinion, none of the above-mentioned cases are directly on point in this case. We agree that O 3 r 2 is for the purpose of computing time stipulations under the Rules of Court 2012 itself. The issue in the instant case is about the determination of the date of the act of bankruptcy seven days after the date of the service of the bankruptcy notice. The Insolvency Act 1967 (Revised 1988) and the Insolvency Rules 2017 do not provide for time computation. However, as we mentioned earlier, r 284 of the Insolvency Rules specifically provides for the adoption of the Rules of Court 2012 in the event of a lacuna. There is no dispute that there is a lacuna with regard to the calculation of a time stipulation in the Insolvency Rules.

[17] In this regard, we are persuaded by the reasoning of the High Court in the case *Re Stephen Wong Leong Kiong; Ex Parte: HSBC Bank Malaysia Bhd* [2005] 2 MLRH 33; [2005] 5 CLJ 504 which addressed the issue of the date of the act of bankruptcy which is also the very same issue that has arisen here. Low Hop Bing J (as he then was) held that in view of the lacuna in respect of the method of time computation in the Bankruptcy Rules 1969, O 3 r 2(5) of the Rules of High Court applies. His Lordship said that O 3 r 2(5) excludes the day before the weekly holiday and the weekly holiday or the public holiday. Low Hop Bing J said as follows, in respect of the rationale for excluding public and weekly holidays:

> The exclusion is intended to ensure that the reckoning of the short period of seven days or less would only include clear working or office days so that the aforesaid excluded days would not be reckonable days.

[18] Although, s 54(1)(d) and s 105(d) of the Interpretation Act were not discussed in the above judgment, we are of the view that in respect of the determination of the date of the act of bankruptcy, the reasoning of His Lordship is persuasive for the following reasons.

[19] We are mindful that the Interpretation Act is principal legislation and that the Insolvency Rules 2017 and Rules of Court 2012 are subsidiary legislations.

A However, the issue here is not whether subsidiary legislation should give way to principal legislation. Rather, the issue at hand is the application of the maxim that the special provision of the law is to be preferred to the general provision. Whilst, the Interpretation Act applies generally to all laws, r 284 of the Insolvency Rules 2017 has specially provided for the application of the Rules of Court 2012 in the B event of a lacuna. Therefore, O 3 r 2(5) Rules of Court 2012 which provides for time computation has become a special law for the purpose of determination of the act of bankruptcy. It would be otherwise if r 284 did not make such a provision.

[20] If the argument that principal legislation should override subsidiary legislation is accepted regardless of the legal maxim that a general provision of the law should C yield to a special provision of the law, it can also be argued with equal force that even in the conduct of general civil litigation, s 54 of the Interpretation Act would apply and that public holidays will be excluded if the specified period is six days or less. This would render otiose O 3 r 2 and other provisions in the Rules of Court 2012 that are not consonant with the Interpretation Act although they are special D provisions for the purpose of civil procedure.

**[16]** Berdasarkan kepada garis panduan yang dinyatakan oleh Mahkamah Rayuan tersebut maka pengiraan perbuatan kebankrapan dalam kes ini menunjukkan bahawa sepatutnya ia berlaku pada 26 Disember 2019 dan E bukannya 24 Disember 2019 disebabkan 25 Disember 2019 adalah hari kelepasan am. Ini bermakna catatan di dalam petisyen rayuan yang menyatakan bahawa tarikh kebankrapan adalah 24 Disember 2019 adalah tidak tepat. Mahkamah juga mendapati tiada permohonan dibuat oleh pemiutang penghakiman untuk meminda tarikh perbuatan kebankrapan F tersebut di dalam petisyen pemiutang sehinggalah perintah kebankrapan diberikan oleh mahkamah kepada penghutang penghakiman pada 28 Oktober 2021.

*Isu (b)*

G

**[17]** Persoalan seterusnya ialah adakah kesilapan di dalam penyataan perbuatan kebankrapan itu menyebabkan perintah kebankrapan tersebut perlu dibatalkan dan tidak teratur di sisi undang-undang.

H

**[18]** Peguam pemiutang penghakiman yang bijaksana telah berhujah menyatakan bahawa kesilapan di dalam penentuan perbuatan kebankrapan tidak menjejaskan keesahan petisyen pemiutang dan perintah kebankrapan yang diberikan. Ini adalah disebabkan daripada tempoh perbuatan I kebankrapan berlaku sehinggalah tarikh kepada perintah kebankrapan pihak penghutang penghakiman ada membuat pembayaran terhadap hutang-hutang tersebut yang menunjukkan bahawa penghutang penghakiman mengakui berkenaan dengan penghakiman ke atasnya yang menjadi asas kepada notis kebankrapan dan petisyen pemiutang.

**[19]** Sebaliknya peguam penghutang penghakiman yang bijaksana berhujah bahawa petisyen pemiutang dan perintah kebankrapan ini tidak boleh dipertahankan disebabkan dari awal perbuatan kebankrapan adalah tidak teratur. Beliau menegaskan bahawa sepatutnya pemiutang penghakiman membuat permohonan untuk memperbetulkan tarikh perbuatan kebankrapan di dalam petisyen pemiutang bagi membolehkan perintah kebankrapan diberikan dengan teratur di sisi undang-undang. Malahan peguam penghutang penghakiman menyatakan pihak penghutang penghakiman tiada isu berkenaan dengan isu tersebut. Apa yang menjadi isu dalam kes ini ialah asas kepada petisyen itu sendiri sudah terkhilaf dan menjadikan segala tindakan yang berlaku selepas daripada perbuatan kebankrapan yang tidak teratur itu adalah tidak sah.

**[20]** Pemiutang penghakiman telah mengemukakan kes *Affin Bank Bhd (formerly known as Perwira Affin Bank Bhd) v Abu Bakar bin Ismail* [2020] 2 MLJ 689; [2020] 3 CLJ 739 dan menyatakan bahawa apa yang penting semasa perintah kebankrapan diberikan ialah pada masa itu tiada keterangan yang menunjukkan bahawa penghutang penghakiman adalah berkemampuan menjelaskan hutang (*solvent*) dan memetik seperti berikut:

> [49] In the instant case, at the time the AORO was granted against the debtor, there was no evidence that he was solvent. No consideration ought to be given to the debtor's ability to pay his debts based on subsequent change of circumstances. If at all, any change of circumstances post AORO ie, any recovery of moneys by the debtor would offer the debtor an opportunity to pay the debts in full which would enable him to obtain an annulment order, having made such full payment. But this was not done. The debtor made no payment to satisfy the judgment debt.

**[21]** Mahkamah ini berpendapat bahawa di dalam kes ini ia adalah agak unik dan perlu dibezakan dengan kes *Affin Bank Bhd v Abu Bakar Ismail*. Dalam kes ini ialah tarikh perbuatan kebankrapan itu sendiri adalah tidak teratur. Mahkamah mendapati tiada permohonan untuk membetulkan ketidakaturan tersebut di dalam petisyen pemiutang sehinggalah kepada perintah kebankrapan. Mahkamah ini berpendapat bahawa prosiding kebankrapan adalah sesuatu yang serius. Ia melibatkan kedudukan penghutang penghakiman yang akan hilang atau dikawal urusan hal ehwal pentadbiran kewangan beliau yang memberi kesan *status quo* beliau. Oleh itu kepatuhan yang ketat kepada peraturan-peraturan semasa mengemukakan notis kebankrapan, petisyen penghutang hatta sehingga kepada pengisytiharan kebankrapan perlu dipatuhi dengan sewajarnya. Ia bukan bermakna bahawa ketidakpatuhan tersebut akan menyebabkan pemiutang penghakiman akan hilang haknya untuk menguatkuasakan perintah yang dikeluarkan oleh mahkamah terhadap sejumlah wang yang terhutang oleh penghutang penghakiman kepada pemiutang penghakiman.

**[22]** Oleh yang demikian pemiutang penghakiman di bawah kerangka undang-undang insolvensi boleh membuat permohonan untuk memperbetulkan kekhilafan yang berlaku di dalam dokumen-dokumen yang dikemukakan untuk perintah kebankrapan seseorang. Pada masa yang sama mahkamah juga mempunyai bidang kuasa untuk membatalkan sesuatu perintah kebankrapan di bawah s 105 Akta Insolvensi 1967 jika berpendapat bahawa perintah tersebut tidak wajar diberikan.

**[23]** Dalam kes ini mahkamah berpendapat bahawa kesilapan tarikh perbuatan kebankrapan itu adalah sesuatu yang asas (*material*). Ia menjadi tonggak kepada prosiding kebankrapan yang seterusnya. Mahkamah tidak boleh memandang enteng kepada kesilapan tersebut. Ia mewajarkan mahkamah ini untuk membenarkan rayuan penghutang penghakiman terhadap keputusan timbalan pendaftar.

*Isu (c)*

**[24]** Akhirnya, rayuan penghutang pengakiman dibenarkan. Perintah timbalan pendaftar bertarikh 21 September 2022 diketepikan. Mahkamah memutuskan bahawa notis kebankrapan bertarikh 30 Oktober 2019 diketepikan, bahawa tiada perbuatan kebankrapan oleh penghutang penghakiman di bawah k 96 Kaedah-Kaedah Insolvensi 2017, petisyen pemiutang penghakiman bertarikh 19 Jun 2020 diketepikan dan perintah kebankrapan atas permohonan pemiutang penghakiman ke atas penghutang penghakiman pada 28 Oktober 2021 dibatalkan.

*Rayuan dibenarkan.*

Dilaporkan oleh Ahmad Ismail